In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1522

RAFAEL HERNANDEZ COLON, etc.,
APPELLANTS,

v.

GERMAN ORTIZ, et al.,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

APPELLEES' MOTION TO AFFIRM AND BRIEF IN SUPPORT OF MOTION TO AFFIRM

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MOTION TO AFFIRM

COME now the Appellees by their undersigned counsel and respectfully move this Honorable Court to affirm the decision of the three-judge court of the United States District Court of Puerto Rico, on the ground that the issues raised are so insubstantial that a plenary hearing is not warranted. *Bailey* v. *Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962).

The Appellants challenge to the decision on the merits would in effect require a reversal of a complete line of cases, which represent one of the great achievements of this Court in making American democracy so viable. Solid

support of the lower court's holding is found in *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Avery* v. *Midland County,* 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1967); *Sailors* v. *Board of Education,* 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1966); *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Hadley* v. *Junior College District,* 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1969).

The jurisdictional issues raised by Appellants are equally insubstantial. The doctrine of abstention was examined by three different District Judges and four judges of the United States Court of Appeals for the First Circuit and was found to be inapplicable.

The jurisdiction of the district court under 28 U.S.C. § 2281 was held proper last term in *Calero Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S. Ct. 767, 42 L. Ed. 2d 452 (1974).

The argument that 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3) do not apply to the Commonwealth of Puerto Rico should not be entertained. Carried to its logical conclusion this argument would effectively deny all citizens and residents in the Commonwealth of Puerto Rico to the rights, privileges and immunities guaranteed by the United States Constitution.

WHEREFORE, for the foregoing reasons, more fully elaborated in the accompanying brief, it is respectfully prayed that the decision below be affirmed without further argument.

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Jurisdictional Statement

Jurisdiction has been properly invoked under 28 U.S.C. § 1253. However, it is respectfully submitted that the issues presented are so insubstantial that the opinion below should be affirmed.

Question Presented

The only real question presented in this appeal is whether the holding on the merits by the three-judge court in *Ortiz* v. *Colon,* 385 F. Supp. 111 (D.P.R. 1974) is correct. Even though the question decided by the court below has

never been squarely presented in this Court, the motion for affirmance is proper. *Bailey* v. *Patterson,* 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962). Geographical dilution of one's vote is not the only method to effectively disenfranchise certain voters in order to perpetuate power. Judge Coffin's opinion striking down 21 L.P.R.A. §§ 1152(b) is based upon the solid foundation of this Court's teachings in *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Avery* v. *Midland County,* 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1967); *Sailors* v. *Board of Education,* 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1966); *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Hadley* v. *Junior College District,* 397 U.S. 50, 90 S. Ct 791, 25 L. Ed. 2d 45 (1969).

The appellants have raised and placed in the forefront certain alleged jurisdictional barriers. Abstention has been raised from the outset and has been rejected five times. The lack of jurisdiction of the District Court of Puerto Rico, or stated otherwise, the inapplicability of 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3) is of recent vintage. In essence, the appellants are claimant that because of the unique status of the Commonwealth of Puerto Rico, neither the Fifth or Fourteenth Amendments of the United States Constitution apply in Puerto Rico, or, if they do, violations thereof by the Commonwealth may only be redressed in the Commonwealth Courts. This contention is refuted in the second portion of the brief.

Counterstatement of the Case

This is an action by citizens, residents and voters of the Municipality of San Juan, who brought the action on their own behalf and on behalf of all the residents of San Juan

for a declaratory judgment striking the special provisions for the creation of the San Juan Municipal Assembly as unconstitutional and for injunctive relief to prevent its enforcement.

The statutory scheme embodied in 21 L.P.R.A. § 1152(b) provides for 12 elected members to the Municipal Assembly, no more than 9 of whom may be members of the same political party, and 5 members to be appointed by the Governor of Puerto Rico. All assemblymen have the same powers. No other Municipality in Puerto Rico has appointed assemblymen, 21 L.P.R.A. § 1152(a).

The Municipal Assemblies of Puerto Rico have the power to levy and collect taxes, 21 L.P.R.A. §§ 641, et seq.; the power of eminent domain, acquisitions of property, public service undertakings, issuance of bonds and the ability to charge for services, 21 L.P.R.A. §§ 661, et seq. They have the power to own property, to obtain loans and grants from the federal government for the construction of public works and to issue special bonds for such construction, 21 L.P.R.A. §§ 811, et seq. Municipal governments also have the power to make temporary loans or issue temporary bonds or promissory notes subject to a statutory limit, 21 L.P.R.A. § 921.

Most of the appropriation ordinances require a two thirds vote of the governing body of the municipality. Pursuant to 21 L.P.R.A. § 1107 the municipalities are granted "full legislative and administrative powers in all matters of a municipal nature which redound to the benefit of the people and for their development and progress, and are authorized to develop general welfare programs and to create the necessary organizations for such purpose. Such powers include the operation of a school students transportation system, with or without charge,...". The second paragraph of this same section of law confers broad legislative and administrative power upon the

Municipal Assembly to govern the affairs of the Municipality.

The mayor of a municipality is the chief executive officer who must approve and sign the ordinances and resolutions of the Municipal Assembly or who may veto such resolutions. Two thirds of the total members of the assembly must join in their vote to overrule a Mayor's veto. The Municipal Assembly also has the power to create penal provisions for violation of municipal ordinances. The broad general duties and powers of the Municipal Assembly are iterated in 21 L.P.R.A. § 1173.

The statute which treats San Juan differently from all other municipalities in Puerto Rico dates from 1960. Despite the stated objectives of the law cited at pages 23-24 of Appellants' Brief, the only purpose the law serves is to concentrate political power in the hands of the Governor and prevents any effective grass roots leadership or political power base by the elected officials of San Juan, be they members of the same political power as the Governor, or members of an opposition party.

This action was commenced immediately after the inauguration of the Governor and prior to the taking of office by the San Juan Assemblymen. The "Statement" of the appellants apart from its editorial comments, correctly sets forth the history of the litigation.

Argument

Point I

21 L.P.R.A. § 1152(b) Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

For all of the reasons expressed in the opinion of the three-judge court, *Ortiz* v. *Colon*, 385 F. Supp. 111 (D.P.R. 1974), the judgment should be affirmed. Since new arguments have been raised by the defenders of the statute, a refutation of appellants' brief is necessary.

The appellees refuse to be drawn into a historical discussion of the "democratic" nature of the appointed "cabildos". Suffice it to say that the appointed "cabildo" does not satisfy the requirement of the guaranteed republican form of government.[1] Nor is there any quarrel with the proposition that municipal governments are "instrumentalities" of the states. Plaintiffs have always conceded that this concept pervades in American political life. The three-judge court below also recognized the needed flexibility and room for innovation in municipal government if the modern megalopolis were to be responsive to a larger, more complicated and varied constituency.

The lower court found that the additional representation for the minority resulting from the gubernatorial appointment made it possible for the minority to thwart any legislative policy of the Assemblyman who received the majority of the voters' support. This is a systematic dilution of the vote of all the residents of San Juan, said the court, who did not support the successful gubernatorial candidate. In this analysis, the court was correct. As the Supreme Court stated in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) at page 565 of the official report:

> "Logically, in a society ostensibly grounded on representative government, it would seem reasonable

[1] The hoary tradition may be given due weight in many fields but can have no bearing on fundamental rights. The laws of distress and distraint, for example, is at least as old as the rise of feudalism. It had existed in Pennsylvania since Colonial times, yet it was held unconstitutional following the teachings of this Court. *Santiago* v. *McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *Gross* v. *Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972); *Gibbs* v. *Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973).

that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result".

The word "State" con be read in the proper context as city. *Mancuso* v. *Taft,* 476 F.2d 187 (1st Cir. 1973).

But the Court could have gone farther and declared the statute void on its face. In Puerto Rico, with its polarization of parties on all issues, dependent upon the official party platform concerning status, it is obvious that a governor from one party could, and probably would, block a San Juan Mayor and Assembly elected by another party, on any issue that would enhance the public image of the state-wide minority. Yet, even when the Mayor and Assemblyman are from the same party, the Governor's appointees, who owe no allegiance to the voters or residents of San Juan, can block any measure of importance in the Municipal Assembly that requires a two thirds majority.

At the time this law was passed (July, 1960), one party was in control of Puerto Rico and San Juan and had been in control for nearly 16 years. It was then apparent that because of its size and growth, the political leader of San Juan had a base upon which to build support and have an independent opportunity to challenge the state wide political leadership within his or her own party. The appointments by the Governor became the means to exercise an effective check upon the aspirations of the elected leaders of San Juan of their constituents. This could destroy democratic processes at the grass root level as the lower court fully appreciated.

In 1968 the "opposition" party captured the Gubernatorial post, San Juan Mayoralty and Assembly and the House of Representatives. The Senate remained in the hands of the party that had been in control for a generation. While much legislation and many executive appointments were stymied because of the interparty strife in the Legislature, there was also intra-party strife between the city and state government as well. One piece of legislation upon which both parties agreed in the Legislature was House Bill 510. This Bill provided for the election of a Municipal Assemblyman from each of the eight electoral districts of San Juan, and six Assemblymen at Large. The minority parties would be guaranteed three Assemblymen. The present Governor, who at the time was President of the Senate, enthusiastically supporte this Bill. The then Governor vetoed the Bill. The veto cannot be justified on any governmental basis but only upon an internecine party-power basis. Certainly, the proposed measure would have enhanced the republican form of government to which all official documents pay homage. Contrarywise, the will of the people would have been even more directly represented had the measure not been vetoed, because each area of the city would have its own voice in the legislative body of the city. Conceding, as we must, that at large representation is not per se unconstitutional,[2] we also submit that representation by area with a similar social and economic point of view is more democratic and

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[2] *Dusch* v. *Davis*, 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967); *Whitcomb* v. *Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971); *Burns* v. *Richardson*, 384 U.S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401 (1965); But compare *Wallace* v. *House*, 377 F. Supp. 1192 (W.D. La. 1974) and cases cited therein. While no claim is made that San Juan is geographically divided into racial groupings, the Court can take judicial notice that it is so divided economically, as are most cities.

a more faithful copy of the model republican form of government.

There is, therefore, no "rationale" for the present Section 1152(b). The alleged "rationale" is mere rationalization. The motive of the law is political control in the hands of the top party factotum to prevent the loss of power or prestige to the city government or its elected officials. *A fortiori*, if this motive is present when the same party is in control of both the Governor's mansion and the City Hall, it is more strongly felt when the occupants of these houses are of different parties. In the latter case it does more than destroy the form of republican government, it weighs votes differently depending upon which voters voted for the successful gubernatorial candidate.

Plaintiffs, appellees realize that this brings into focus an issue that the majority of the three-judge court did not meet, *i.e.*, May a state create a local legislative body, the representatives to which are selected in whole or in part by the appointive rather than the elective process? This question was reserved by the Supreme Court in *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967), but it is the essence of the problem. The Municipal Assembly of San Juan is a body with full legislative powers and the availability of the administrative-legislative distinction is not present here as it was in *Sailors*.

We respectfully urge that a legislative body must, under a republican form of government, be wholly elected. Appointed officials, other than for a vacancy during an unexpired term should not be contemplated in a free society.[3] A republican form of government is no idle guarantee, and such a government connotes direct election of all state

[3] *Patterson* v. *Burns*, 327 F. Supp. 745 (D. Hawaii 1971) (three-judge court); *Kaelin* v. *Warden*, 334 F. Supp. 602 (E.D. Pa. 1971) (three-judge court).

and local legislators.[4] While *Forston* v. *Morris*, 385 U.S. 231, 87 S. Ct. 446, 17 L. Ed. 2d 330 (1966) does hold that under certain circumstances a state legislator may elect or appoint a governor, the corollary that a governor may appoint a legislator for anything more than an unexpired term finds no support anywhere other than in non-democratic countries. All Americans must be reassured after weathering a national crisis unparalleled in our history, that the Constitution works, and that separation of powers will prevent the usurpation of power by the executive.

The compelling state interest test is the only test that may be applied in assessing state action where the sanctity of the vote is concerned. Any exclusion of citizens from the electoral process in general elections must be measured against that standard. *Kramer* v. *Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); *Stone* v. *Stovall*, 377 F. Supp. 1016 (N.D. Tex. 1974) (three-judge court).[5] Therefore, the holding of the majority of the lower court is correct, there remains the unexpressed conclusion that any legislative body cannot pass constitutional muster if its members are appointed in whole or in part for any purpose other than to assure

[4] It is acknowledged that states need not create municipalities, nor even grant the franchise to the administrative sub-divisions it may create. However, once that franchise is granted, the right to vote, or to have all citizens votes counted equally may not be conditioned. *Avery* v. *Midland County, Texas*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968); *Hadley* v. *Junior College District*, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970).

[5] Special purpose elections affecting only certain groups of citizens need not conform to this rigid test. *Salyer Land Co.* v. *Tulare Lake Basin*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973).

minority representation.[6] If it is correct to say, as the Supreme Court and lower court herein has said, "[it is] within communities and neighborhoods that political association can be most effective" (R. 52), then, it is at that level that the guarantee of a republican form of government must be most dearly defended.

Finally, it must be pointed out that San Juan plays no more a "unique" role in the life of Puerto Rico than does Boston in the life of Massachusetts or Honolulu in the life of Hawaii. The argument in 1960 by the Senate Majority Leader was specious because none of the activities he mentioned is controlled by the Municipality. The port of San Juan (and its international airport) is controlled by the Puerto Rico Ports Authority. 23 L.P.R.A. §331 *et seq.* The University of Puerto Rico is no longer concentrated in San Juan, but the largest campus remains within the city's boundaries. Even that campus is controlled by the Commonwealth government. 18 L.P.R.A. §601 *et seq.* The large traffic arteries are within the jurisdiction of the insular government. 9 L.P.R.A. §2001, *et seq.* Banking, 7 L.P.R.A. §1, *et seq.*; The Government Development Bank, 7 L.P.R.A. §551 *et seq.*; the Puerto Rico Industrial Development Company, 23 L.P.R.A. §271 *et seq.*, and industrial tax exemption, 13 L.P.R.A. §221, *et seq.* are all subject to state control. Nor do the appointed members of the Municipal Assembly represent areas other than San Juan. All appointed Assemblymen since the statute was enacted in 1960 have always been San Juan residents. Appellees respectfully submit that the so-called "justification" for the statute does not even satisfy the lesser standard of rational and legitimate state interest.

[6] There has never been a claim that guaranteed minority representation is unconstitutional. *Lo Frisco* v. *Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) (Three-judge court). Under the law in question this minority guarantee may be converted into minority rule. *Cerezo* v. *Buso*, ___ U.S. ___, 95 S. Ct. 767, 42 L. Ed. 2d 795 (1975), which was dismissed for want of a substantial question also involved Puerto Rico's guaranteed minority representation statute.

The holding below should be summarily affirmed.

Point II

Jurisdiction of the United States District Court Was Properly Invoked and Exercised.

A. *The Doctrine of Abstention Is Inapplicable.*

Appellant, as do all state, territorial or Commonwealth governments, raises the pseudo-jurisdictional ground of abstention. Abstention is a judicially created doctrine first enunciated in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). It has become, in some instances, an additional self-imposed "barrier to the assertion by federal courts of the jurisdiction Congress has bestowed on them." Mr. Justice Douglas, dissenting in *Harris County Commissioner's Court* v. *Moore*, ___ U.S. ___, 95 S. Ct. 870, 878, 43 L. Ed. 2d 23 (1975). The Governor, appellant herein, has raised the issue three times before the District Court of Puerto Rico and twice before the United States Court of Appeals for the First Circuit.

Appellants now contend that in light of the opinion in *Harris County Commissioner's Court* v. *Moore*, ___ U.S. ___, 95 S. Ct. 870, 43 L. Ed. 2d 23 (1975), the three different district court judges and the four judges of the Court of Appeals erred in reading the prior decisions of this Court. The nub of the abstention doctrine as stated in *Harris County Commissioner's Court* is that "when a federal constitutional claim is premised upon an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to

settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question." 95 S. Ct. at 875. Abstention, however, may only be invoked in "special circumstances". *Zwickler* v. *Koota,* 389 U.S. 241, 248, 88 S. Ct. 391, 395, 19 L. Ed. 2d 444 (1967). The "special circumstance" that the District Court in *Zwickler* thought controlling was that the state statute could be construed by the state courts to avoid or modify the constitutional question. In reversing, this Court said, "But we have here no question of a construction of [the statute involved] that would 'avoid or modify the constitutional question' ". 389 U.S. at 249, 88 S. Ct. at 396.

Appellants admit that "the statute itself has only one interpretation". Appellants' Brief, p. 14. They must also admit that a state law claim was not raised in the complaint. Even were the Commonwealth Supreme Court to pass upon the question and construe the Municipal Law as a valid exercise of legislative power, it would not, in any way, affect the federal claim. *City of Chicago* v. *Atchison, Topeka & Santa Fe R. Co.,* 357 U.S. 77, 84, 78 S. Ct. 1963, 1067, 2 L. Ed. 2d 1174 (1958); *Public Utilities Comm'n* v. *United Fuel Gas Co.,* 317 U.S. 456, 462-463, 63 S. Ct. 369, 373-374, 87 L. Ed. 396 (1943).

There are four main policy considerations in the application of abstention:

1. The avoidance of a premature constitutional decision by a possible narrowing construction of the state law by a state court. *Lake Carriers Association* v. *MacMullan,* 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972).

2. The avoidance of needless conflict in the federal-state relationships. *Younger* v. *Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

3. The avoidance of the federal judiciary making tentative decisions on issues of state law. *Reetz* v. *Bozanich,* 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970); or the

decision on the constitutionality of a state statute that is vague and has never been interpreted by the state tribunals. *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 91 S. Ct. 156, 27 L. Ed. 2d 174 (1970).

4. The avoidance of unnecessary interference with state functions or regulatory schemes. *Lake Carriers' Association* v. *MacMullan, supra.*

None of the foregoing considerations is applicable. There can be no other meaning of the statute and no matter what a tribunal in Puerto Rico may say of the constitutionality of the statute, the federal claim would require federal adjudication. Whether the Supreme Court of Puerto Rico were to say, as the appellant says in its brief, that the Commonwealth Courts should be the first (if not the sole) arbiter of constitutionality, does not affect the federal rights of plaintiffs to equal protection of the law.[7]

If deference must be given to the unique status of Puerto Rico or its special relationship with the United States, that consideration does not embrace any different standard of testing the federally protected rights of citizens than

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[7] In *Gay* v. *Board of Registration Commissioners*, 466 F.2d 879 (6 Cir. 1972) after outlining policy considerations in the doctrine of abstention, the Court also listed the exceptions to the rule as distilled from Supreme Court opinions. Abstention is improper (1) if the underlying issue of state law is not the controlling issue, *McNeese* v. *Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1962); (2) if the federal right is not 'entangled in a skein' of state regulations, *McNeese* v. *Board of Education, supra*, (3) if it would require piecemeal litigation, *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1963); (4) if the issue of state law is certain and does not relate to questions which only a state court could authoritatively construe. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1970); *Fornaris* v. *Ridge Tool Co., supra.* There are, indeed, still other exceptions, viz., to prevent immediate loss of constitutional rights. *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

does the relationship between the United States and any State.

The tortuous path of this litigation, including the refusal by the Commonwealth to enact legislation that would have avoided the injunction, indicates a clear desire for delay. For political rather than governmental reasons, there has been an attempt to prevent a final adjudication in time for proper procedures in the 1976 elections. This long delay, by itself, is sufficient reason to reject the doctrine of abstention in this case. *Hostetter* v. *Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329, 84 S. Ct. 1293, 1296, 12 L. Ed. 2d 350 (1964).

B. *Puerto Rico Is a "State" Within the Meaning of 28 U.S.C. §1343(3) and 42 U.S.C. §1983.*

In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), *rehearing denied* 417 U.S. 977, 94 S. Ct. 3187, 41 L. Ed. 2d 1148, (1974), it was stated:

> "... we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as "State statute[s]" for purposes of the Three-Judge Court Act, serves, and does not expand the purposes of [28 U.S.C.] §2281. We therefore hold that a three judge court was properly convened under that statute, and that direct appeal to this Court was proper under 28 U.S.C. §1253 . . ."

At the end of the omitted footnote, the Court added,

> "We have no occasion to address the question whether Puerto Rico is a 'State' for purposes of 28 U.S.C. §1343, a jurisdictional basis of appellee's complaint. Since the complaint and lease agreement, as incorporated, fairly read, leave little doubt that the matter in controversy exceeds $10,000 and arises under the Constitution of the United States, there is jurisdiction under 28 U.S.C. §1331."

In the instant case there is likewise no doubt that the matter in controversy arises under the Constitution of the United States, and such jurisdictional basis is alleged in the complaint. But jurisdiction under 28 U.S.C. §1331 was not specifically alleged in the complaint, although it is hard to believe that the value of the right to vote and have one's vote equally counted, does not likewise exceed the value of $10,000.

Seizing upon the footnote in *Calero-Toledo*, appellants at oral argument in the Court of Appeals in February 1975, raised the argument that the District Court had no original jurisdiction under 28 U.S.C. §1343 because like the District of Columbia—as held in *District of Columbia* v. *Carter*, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973), *rehearing denied*, 410 U.S. 953, 93 S. Ct. 1411, 35 L. Ed. 2d 694 (1973)—Puerto Rico is neither a 'State or Territory' within the meaning of that statute. An analysis of this argument shows that what the Commonwealth officials are really advocating is that the Fourteenth Amendment does not apply to Puerto Rico. Since they also insist that the Fifth Amendment is equally inapplicable, after the achievement of Commonwealth status, they contend that the ultimate decision concerning federally guaranteed rights of citizens, residents of Puerto Rico lies, not in the federal judiciary, but in the Commonwealth Courts.

The history of 42 U.S.C. §1983 has been set forth by this Court in *District of Columbia* v. *Carter, supra.* Briefly, the genesis of §1983 is in §1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, §1, 17 Stat. 13, the primary

purpose of which was "to enforce the Provisions of the Fourteenth Amendment". The commands of that Amendment are addressed only to the State or to those acting under color of its authority. But unlike the Amendment upon which it is based, §1983 applies equally to "any State or Territory". Congress has plenary control over the territories, but as pointed out in *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 546, 82 S. Ct. 1459, 1470, 8 L. Ed. 2d 671 (1962), the scope of delegated powers to the territories was nearly as broad as that enjoyed by the States.

The 1871 Act and the present §1983 were passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape,* 365 U.S. 167, 180, 81 S. Ct. 473, 480, 5 L. Ed. 2d 492 (1961). Everywhere the word "state" is included in the foregoing quote, it can be read "state or territory". These statutes, however, did not apply to either the federal government or the District of Columbia. *District of Columbia* v. *Carter, supra.* Federal laws and the acts of federal officials under color of authority are subject to review in the federal courts under the Constitutions and laws of the United States. Any statute allegedly depriving citizens of equal protection of the laws could be challenged under the Fifth Amendment and §§ 2282 and 2284 of Title 28. A federal official can be enjoined without enabling legislation, *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Thus, while §1983 is inapplicable to the District of Columbia, there always exists a remedy in the federal courts to protect the rights, privileges and immunities guaranteed by the Fifth Amendment.

In *Montalvo* v. *Colon,* 377 F. Supp. 1332 (D.P.R. 1974) a post-*Calero-Toledo* decision, a similar issue was raised. *Montalvo* represented a challenge to Puerto Rico's criminal abortion statute in the light of this Court's decisions in *Roe* v. *Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and *Doe* v. *Bolten,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973). Injected into that controversy was the issue of whether the opinions of this Court applied to Puerto Rico, 377 F. Supp. at 1335 fn. 3. After reviewing the status of Puerto Rico as expressed in judicial decisions through the change in status from territory to Commonwealth, commencing with *Downes* v. *Bidwell,* 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901) and ending with *Calero-Toledo* v. *Pierson Yacht Leasing Co.,* 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), the three judge court concluded:

> "Finding such great similarity in the practical and theoretical application of the tests used as to both states and unincorporated territories, we may assume that the notion of 'fundamental rights, which has undergone such a metamorphosis in the context of interpretation of the Fourteenth Amendment, must be deemed to have had a similar expansion as to Puerto Rico. In addition, we think that we may safely assume that when a personal right has been found applicable to the states via the Fourteenth Amendment, we may then assume that such right is applicable to Puerto Rico, regardless of the theoretical means used to achieve such a result. After all, citizens of Puerto Rico, in common with citizens of states, are citizens of the United States. In addition, historically, when fundamental rights are involved, courts have been hesitant to find the protection of the United States Constitution lacking and this is no less true

since the advent of Commonwealth. See *Figueroa Ruiz* v. *Delgado, supra* [359 F.2d 718 (1st Cir. 1966)]. Nothing in the course of the creation of a new political status for Puerto Rico in 1950-1952 indicated that such a drastic change in regards to protection of fundamental personal liberties was contemplated. On the whole, therefore, while consideration must be given to the unique history and status of Puerto Rico, rights applicable to the states under the Fourteenth Amendment will be found similarly applicable to the Commonwealth". 377 F. Supp. at page 1341. (footnotes omitted).

The Court of Appeals' decision of February 28, 1975, when it dismissed the appellants' appeal, did not rely solely upon a comparison of the American citizens in Puerto Rico with the American citizens of the 51 states, as claimed by the appellants. It rejected, out of hand, the analogy between the District of Columbia and the Commonwealth of Puerto Rico. It said:

> "The Commonwealth's situation is precisely the opposite [from that of the District]. Indeed, the very reasons which called in *Calero Toledo* for the Commonwealth's special protection by a three-judge district court as a matter of comity and respect—its sovereign status and functional independence from Congressional control—call with equal force for the special protection of the Commonwealth's citizens against unwarranted and otherwise insufficiently checked governmental action provided by 42 U.S.C. §1983 and 28 U.S.C. §1343(3)"
>
> Appendix to Appellants' Brief, p. 35a.

There is nothing in either *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n. 1, 91 S. Ct. 156, 157, 27 L. Ed. 2d 174

(1970) or *Palmore* v. *United States,* 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973) that dilutes the *Montalvo* rationale or that of the Court of Appeals quoted above. Those cases do not deal with the status of either the District of Columbia or the Commonwealth of Puerto Rico nor with rights of citizens to challenge governmental action, but, in their procedural holdings, at least, only with the appellate power of this Court as expressed in 28 U.S.C. §1254 (2).

The main thrust of the Commonwealth's argument is that because it has a higher degree of autonomy over local matters than do states, and to consider it a territory would be demeaning, any federal court review of violations of allegedly federally protected rights, is incompatible with its *sui generis* status under the "Compact". (Public Law 600, 64 Stat. 319; 66 Stat. 327, 48 U.S.C. §731d.) That proposition and the purpose of the Civil Rights Act cannot be reconciled. It would shed all residents of Puerto Rico of the cloak of protection offered by the federal constitution.

Appellees are not stating that this Court must decide at this point whether for the future development of the unique relationship between the United States and Puerto Rico, the Fifth or Fourteenth Amendment must be invoked in all conceivable political, social or economic contexts. There may very well be areas where certain laws of Congress should not apply to Puerto Rico. But in the realm of fundamental rights afforded all citizens and aliens there can be no distinction between residents of Puerto Rico and any other part of this country. Foreclosing the federal court as the forum for redress of those rights would chill the assertion of constitutional right by penalizing those who choose to exercise them. If such a law were enacted by Congress it would be patently unconstitutional. *United States* v. *Jackson,* 390 U.S. 570, 581, 88 S. Ct. 1209, 1216, 20 L. Ed. 2d 138 (1968).

The denial of the franchise is the denial of a fundamental right. *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Any law prohibiting access to the federal court to redress that right, would itself be a denial of equal protection. Nearly all State judges would feel themselves the equals of federal judges in protecting constitutional rights. The Puerto Rico Supreme Court is not unique in that respect. Nevertheless, Congress entrusted the task to the federal judiciary and there, as pointed out by the Puerto Rican federal judges in *Montalvo* v. *Colon*, *supra*, it should remain.

C. *The Injunction Is Properly Drawn.*

In 1972 Puerto Rico had elected a Governor and legislature dominated by the Popular Democratic Party. At the same time the majority of the voters of the Municipality of San Juan voted for a Mayor and Municipal Assembly representing the New Progressive Party. For three years that Municipal Assembly has been unable to effectively legislate, even within the limited sphere of its authority, because all important legislation requires a two-thirds majority. With the Governor's appointees (5) and the guaranteed minority representation (2), to the Governor's party, it is impossible to muster a two-thirds majority. The campaign promises and platforms of any duly elected majority party in San Juan, are thus, subject to the whim of a single person. This is not a representative democracy and the plaintiffs along with all who voted for the New Progressive Party are suffering irreparable injury.

At no time, not even at the hearing in April, 1975, did the appellants offer a form of injunction that they deemed appropriate. The proposal in their brief is incomprehensible. In effect, they are requesting either no Municipal

election in 1976, or another year of delay before the same injunction fashioned by the three-judge court is put into effect. It demonstrates the same cavalier attitude toward fundamental constitutional rights as displayed in their jurisdictional argument where they claim that they should be the final arbiter of those rights.

The injunction was reluctantly imposed only when the Commonwealth refused to act. It should be immediately reinstated.

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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